Office-Supreme Court, U.S.
FILED
MAY 15 1964
JOHN F. DAVIS, CLERK

No. 1116

In the

Supreme Court of the United States

OCTOBER TERM, 1963

RAILROAD YARDMASTERS OF AMERICA, AFL-CIO,
Petitioner,

v.

ST. LOUIS, SAN FRANCISCO AND TEXAS RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHARLES J. MORRIS,
1601 National Bankers Life Bldg.,
Dallas 1, Texas
Attorney for Petitioner

Of Counsel:

MULLINAX, WELLS, MORRIS & MAUZY
1601 National Bankers Life Building
Dallas 1, Texas

REILLY PUBLISHING COMPANY — 1710 S. HARWOOD — DALLAS, TEXAS — HA 8-8385

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement	4
Reasons for Granting the Writ	10
Conclusion	21
Appendix A	1a
Appendix B	6a
Appendix C	41a

AUTHORITIES CITED

Cases:	Page
Aaxico Airlines, Inc. v. Air Line Pilots Association (No. 20931) —— F.2d —— [55 LRRM 2982, 49 CCH LC ¶18,886]	21, 22
Akron, Canton & Youngstown R. Co. v. Barnes, 215 F.2d 423 (C.A. 7, 1954)	17
Brady v. Trans-World Airlines, 223 F. Supp. 361 [54 LRRM 2480]	20
Brotherhood of Locomotive Engineers v. Baltimore & Ohio Railroad Co., 372 U.S. 284, 9 L.ed.2d 759, 83 S.Ct. 691	12
Brotherhood of Locomotive Engineers v. Louisville & N.R. Co., —— U.S. ——, 10 L.ed.2d 172, 83 S.Ct. ——	17

Page

Cases—(Continued)

Brotherhood of Railroad Trainmen v. Central of Georgia Ry. Co., 305 F.2d 605 (C.A. 5, 1962) 20

Brotherhood of R. Trainmen v. Chicago River & I.R. Co., 353 U.S. 30, 1 L.ed. 2d 622, 77 S.Ct. 635 16, 17, 18

Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768, 72 S.Ct. 1022 20

Brotherhood of Railroad Trainmen v. Smith, 251 F.2d 282 (C.A. 6, 1958) cert. den. 356 U.S. 937, 2 L.ed.2d 812, 78 S.Ct. 778 20

Burke v. Morphy, 109 F.2d 572 (C.A. 2, 1940) 17, 20

Butte, Anaconda & Pacific R. Co. v. Locomotive Firemen, 268 F.2d 54 (C.A. 9, 1959), cert. den. 361 U.S. 864 15, 17

Chicago & Western I.R. Co. v. Brotherhood of Ry. Clerks, 221 F. Supp. 561 [54 LRRM 2013] 20

Elgin, Joliet & Eastern Railway Co. v. Burley, 325 U.S. 711, 89 L.ed. 1886, 65 S.Ct. 1282 (1945) 10, 15

Fiberboard Paper Products Corp. v. N.L.R.B., 322 F.2d 411 (C.A. D.C., 1963) enforcing 138 NLRB 550, cert. granted 375 U.S. 963 (Docket 610, October 1963 Term) 13

Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 223, 70 S.Ct. 14 20

Cases—(Continued) Page

International Powder Metallurgy Co., 134 N.L.R.B. 1601 13

Louisville & Nashville R. Co. v. Brown, 252 F.2d 149 (C.A. 5, 1958) cert. den. 356 U.S. 949, 2 L.ed.2d 843, 78 S.Ct. 913 20

Manning v. American Airlines, Inc., 329 F.2d 32 (C.A. 2, 1964) 11, 17, 20

M.K.T. R.R. Co. v. Locomotive Engineers, 266 F.2d 355 (C.A. 5, 1959), reversed in part, 363 U.S. 528, 4 L.ed.2d 1379, 80 S.Ct. 1326 18

NLRB v. Jacobs Mfg. Co., 196 F.2d 680 (C.A. 2, 1952) 13

NLRB v. Katz, 369 U.S. 736, 8 L.ed.2d 230, 82 S.Ct. 1107 13

Railroad Telegraphers v. Chicago & N.W.R. Co., 362 U.S. 330, 4 L.ed.2d 774, 80 S.Ct. 761 14, 15, 20

Railroad Telegraphers v. Railway Express, 321 U.S. 342, 88 L.ed. 788, 64 S.Ct. 582 17, 20

Railroad Yardmasters v. Pennsylvania R. Co., 224 F.2d 226 (C.A. 3, 1955) 17

Railway Clerks v. Atlantic Coast Line R. Co., 201 F.2d 36 (C.A. 4, 1952), cert. den. 345 U.S. 992, 73 S.Ct. 1131 17

Railway Conductors v. Pitney, 326 U.S. 561, 90 L.ed. 318, 66 S.Ct. 322 11, 19, 20

Rolfes v. Dwellingham, 198 F.2d 591 (C.A. 8, 1952) 17, 20

Cases—(Continued) Page

Ruby v. American Airlines, Inc., 329 F.2d 11 (C.A. 2, 1964) 17

St. Louis, San Francisco and Texas Railway Co. v. Railroad Yardmasters of America, AFL-CIO, 328 F.2d 749 (C.A. 5, 1964), reversing 218 F.Supp. 193 1

Steele v. Louisville & N. R. R. Co., 323 U.S. 192, 65 S.Ct. 226 14, 20

Texas & N.O.R. Co. v. Railway Clerks, 281 U.S. 548, 50 S.Ct. 427 17

Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210, 65 S.Ct. 235 20

Virginia Railway Co. v. System Federation, 300 U.S. 515, 57 S.Ct. 592, 81 L.ed. 789 17

Statutes:

National Labor Relations Act (29 U.S.C. §151 et seq.) § 8(d) 14

Norris LaGuardia Act (29 U.S.C. §101 et seq.) § 13(c) 14

Railway Labor Act (44 Stat. L. 577, as amended; 45 U.S.C. § 151-163)

Section 2 14

Section 2, Seventh 6, 12

Section 6 2, 3, 11, 18

28 U.S.C. §1254 (1) 2

In the

Supreme Court of the United States

OCTOBER TERM, 1963

No. ____

RAILROAD YARDMASTERS OF AMERICA, AFL-CIO,
Petitioner,

v.

ST. LOUIS, SAN FRANCISCO AND TEXAS RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on March 4, 1964.

Opinions Below

The memorandum opinion of the United States District Court for the Northern District of Texas is reported at 218 F. Supp. 193 [unofficially reported at 53 LRRM 2092 and at 47 CCH LC §18,207] and is printed in Appendix B attached hereto (pp. 6a-41a). The opinion of the Court of Appeals is reported at 328 F. 2d 749 [unofficially reported at 55 LRRM 2583 and at 49 CCH LC

¶ 18,789] and is printed in Appendix C attached hereto (pp. 41a-50a).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on March 4, 1964 [R. 311]. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Does the Railway Labor Act require a carrier to exhaust Section 6 notice and bargaining procedures before it may abolish the craft or class of yardmaster and transfer yardmaster duties to other employees outside the yardmaster bargaining unit?

2. Does a district court have jurisdiction under the Railway Labor Act to *construe* a collective bargaining agreement to *the extent necessary* to determine whether a proposed change is (1) a "major dispute" because it constitutes a change in "rates of pay, rules, or working conditions of . . . employees as a class" and is not governed by the terms of the agreement, or (2) a "minor dispute" because it raises only a grievance or dispute growing out of the "interpretation or application of agreements"?

3. May a district court's finding of fact, that a carrier intended to abolish the classification of yardmaster, be ignored or inferentially set aside by the Circuit Court when such finding is not

clearly erroneous and is supported by substantial evidence which the carrier did not contravert?

4. Does a district court have jurisdiction under the Railway Labor Act to enjoin a carrier from violating the *status quo* provision of Section 6?

Statute Involved

The statute involved and referred to herein is the Railway Labor Act (44 Stat. L. 577, as amended, 45 U.S.C. § 151-163), pertinent provisions of which are set out verbatim in Appendix A attached hereto (pp. 1a-6a).

Statement

The facts of this case are accurately described in the opinion of the district court, *infra*, pp. 6a-15a, 17a-20a, 33a-38a.

The case concerns the unilateral efforts of respondent, hereinafter called "carrier" or "railroad," to abolish the classification of yardmaster at its Fort Worth yards and, ultimately, throughout the entire Frisco system. The facts are not in dispute.

Petitioner, hereinafter called "union," was the certified representative of the craft or class of yardmasters employed by carrier [R. 250].

There was and is a collective bargaining agreement in effect between carrier and union, which agreement defined the term "yardmaster" as meaning "yardmasters of all grades except as other-

wise provided herein." [R. 27, p. 3, Rule 1(a)] "By custom and usage it is well understood, however, that the principal duties of yardmasters are to supervise the employees engaged in making up, breaking up and handling train and switching in railroad yards." [R. 28, p. 13] Also, according to undisputed evidence as to uniform past practice, although "the Carrier may abolish a yardmaster position' . . . if any work remains, the carrier may not then require others, outside of the Agreement and not excluded therefrom, to perform such work."[2] [R. 28, p. 13]

In the context of this relationship between the union and the railroad,

> "On or before October 8, 1962, the Railroad determined to abolish the classification of yardmaster at its Fort Worth yards, and to transfer the duties of said classification to other of its employees outside the bargaining unit represented by the Union." [p. 13a, *infra*]

Whereupon it gave written notice abolishing all of the yardmaster positions in Fort Worth.[3]

District Judge Brewster found that "The effect of the plan, if carried out, would have been to

---

[1] Rule 16(e) provided: "This agreement shall not be construed as an obligation to maintain or establish yardmasters' positions, nor as restricting the Company's right to discontinue yardmaster positions now or hereafter established."

[2] The agreement itself provided that: "It is agreed classification of positions covered by this agreement, according to work assignment in effect on date of this agreement, is correct." [R. 27, p. 19, Rule 16(b)].

[3] The positions consisted of one general yardmaster, two yardmasters and one relief yardmaster.

eliminate completely the classification of yardmaster, and to transfer the duties of yardmaster classification to other employees of the Railroad outside the bargaining unit represented by the Union." [pp. 13-14, *infra*]

The elimination of the yardmaster classification was "not made necessary by lack of need for performance of duties heretofore assigned to them, or by anticipation of any reduction in volume of yard traffic. . . . Under the proposed change, the work would continue; but it would be done by clerks, engine foremen and other employees, with the help of IBM machines. The yardmaster duties would be new and increased responsibilities for those employees, and none of them belongs to the bargaining unit represented by the Union which brought this suit." [pp. 14a, *infra*]

In addition the trial court found that

> ". . . the Railroad regards the entire classification of yardmaster as being obsolete; that it has felt and now feels that abolition of the classification and absorption of its duties by other employees would eliminate waste; and that it plans to get rid of the classification by releasing the yardmasters terminal by terminal in its lines. It is further concluded that the plan was part of an over-all one applicable to the Frisco system." [p. 17a, *infra*]

All of the foregoing findings were supported by substantial evidence, and the carrier introduced no evidence to the contrary, nor did any witness deny

that the carrier intended to abolish the classification of yardmaster.

The trial court found that

> "The railroad has been and is attempting to effect the change here involved unilaterally, without giving notice to the Union under Section 6 of the Railway Labor Act, and without any intention or attempt to comply with any of the procedures provided by the Act for helping settle major disputes" [p. 18a, *infra*],

and that

> "... [i]f a permanent injunction is not granted, the Railroad will proceed unilaterally to carry out its plan, with the result that the Union will suffer irreparable injury for which it will have no adequate remedy at law." [p. 19a, *infra*]

District Judge Brewster thus held that "if the plan is carried out, the work heretofore done by the yardmasters and the volume of traffic will still be there, but the yardmasters will not. That unquestionably amounts to abolishing the classification of yardmaster, not merely to discharging individual employees. . . . The plan is one to make a change in the working conditions of the yardmasters, as a class, and is in the teeth of Sec. 2, Seventh, of the Railway Labor Act prohibiting a railroad from taking action to change the working conditions of its employees, as a class, as contemplated by the agreement, without giving a Section 6 notice and proceeding thereafter on the basis

provided for handling major disputes." [pp. 33a-34a, *infra*]

Rather than engage in a strike to protest carrier's unilateral action, the union filed this suit. The district court's opinion commented:

> "The Union in the present case was not required to sit idly by and wait for its yardmaster classification to be eliminated in one swoop over the entire Frisco system or over just the lines of the Texas subsidiary, when it could see that its classification was being effectively nibbled away in a series of actions in separate terminals.[4] [p. 34a, *infra*]

> "The Union had the right to seek full redress under the Railway Labor Act when it awoke to the real result that would inevitably follow from the total of a series of acts which could have appeared at first to be local in nature. When the Railroad sought to do away with the yardmaster classification in the terminal located in the center it had selected for its operations in Texas, it was time for the Union to realize that the Railroad was acting on the basis that the position of yardmaster was obsolete." [p. 35a, *infra*]

Rejecting the railroad's claim that the controversy was "only a minor dispute," Judge Brewster wrote:

---

[4] The district court had found that "The proposed change in the Fort Worth terminal is not the only action of that type which has recently occurred in the Frisco system. Similar moves had been made in yards in Fort Smith, Arkansas; in Enid, Oklahoma; and in Cape Girardeau, Missouri . . . . [T]here were even additional ones in terminals not specifically identified. . . ." [p. 15a, *infra*]

"That claim does not fit the scope of the intended action, the effect of its results on the contract, or the possible consequences to the general public. It is an action that will change working conditions as they are contemplated by the agreement. If the plan continues, *it will terminate that agreement by destroying the subject matter thereof.* It is only reasonable that the Union will use every legal means to keep from losing the contract by planned erosion. That kind of issue does not meet the test of a minor dispute. . . . There is nothing in the grievance procedure set up by the agreement that was intended to or could cope with the problem here. The Adjustment Board does not have the facility or the power to handle it." (Emphasis added)

"The answer to the contention that this case involves only an interpretation of the existing agreement is that the Union's cause of action is based upon an alleged violation of its statutory right under the Railway Labor Act to bargain over a major dispute. The Railroad has tried to convert the suit into one calling for an interpretation of the contract by using its answer to inject that question into the case. The Act does not give a defendant, railroad or union, the power to change a major dispute into a minor one merely by claiming in its answer that some provision of the contract is applicable." [pp. 36a-37a, *infra*]

The trial court examined the contract, and determined that the dispute was not based on contract:

". . . the language quoted [Rule 16 (e)] does not

---

[5] Neither the carrier nor the union has ever submitted this dispute to the National Railroad Adjustment Board.

purport to give the Railroad the power or authority to terminate the contract by eliminating the yardmaster classification entirely, whether done at one time or by a deliberate unilateral process of attrition." [p. 37a, *infra*]

The district court concluded that "The contest over obsolescence shown by the evidence . . . should not be cheapened by treating it as one which can be cured by patchwork or a minor tune-up. The solution . . . will require the use of 'every facility for bringing about an agreement' and the application of the 'pressures for mobilizing public opinion' . . . provided for working out major disputes." The parties were therefore directed to meet and negotiate under procedures provided for settling major disputes, "where both sides of the question will be presented and the public will have some assurance that any adjustment found to be necessary will be cushioned by tempering business efficiency with humaneness." [p. 40a, *infra*]

The Court of Appeals disagreed with the district court's analysis and solution. Noting the carrier's position "that rather than being off base by not proceeding under Section 6 seeking to bargain for a change in existing agreements, it was strictly in line by acting under the existing contract and that it was in fact the Union that was off base in going to court to litigate the issue . . .," the Court of Appeals held that "if there is no *intended change* in an existing contract or agreement there is no requirement under Section 6 that the bargaining procedures be followed." (Emphasis added) [pp. 44a, 45a-46a, *infra*]

The Circuit Court reversed, holding that the carrier's defense "based upon the language of Rule 16(e) raises a substantial issue as to the interpretation of the contract. . . ." The Court thus viewed the change as creating only a minor dispute. It stated: "We do not . . . attempt to construe the contract," and held that "[b]efore a tribunal can decide that the terminations at issue were not justified, it must construe the language of Rule 16 (e)." [p. 48a, *infra*]

> "It is plain that the dispute raised by the complaint could be resolved only by construing the existing contract. It follows that the trial court erred in entertaining jurisdiction of the suit."

The Court noted that the trial court had "received evidence . . . to show that the abolition of the jobs in Fort Worth was but one step in a proposal to abolish all yardmaster jobs or 'classifications,'" [p. 44a, *infra*] but it did not address itself to the trial court's finding that the carrier proposed to abolish the yardmaster classification and transfer its duties to other employees outside the yardmaster bargaining unit.

Reasons for Granting the Writ

The judgment of the Circuit Court demonstrates a necessity for further clarification of the distinction between major and minor disputes described in *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. 711, 89 L. ed. 1886, 65 S. Ct. 1282 (1945). Without such clarification, the statutory duty to bar-

gain provided by the Railway Labor Act is in jeopardy.

The Circuit Court applied a mechanistic formula to determine whether the instant dispute was major or minor. It used a deceptively simple test: does the dispute require a construction of the existing collective bargaining contract? Having found that it does, the court held that *"the trial court erred in entertaining jurisdiction of the suit."* (Emphasis added). The Court did not base its test on whether the dispute could or would be *determined* by the contract. Nor did it base its decision on the exercise of "equitable discretion," as this Court did in *Railway Conductors v. Pitney*, 326 U.S. 561, 567, 90 L. ed. 318, 66 S. Ct. 322. Instead, it announced a *jurisdictional rule* which, if followed, will render the federal courts substantially impotent in finding violations of the status quo provisions of the statute. At issue here is whether, in the real world of labor management relations, a unilateral change in rates of pay, rules or working conditions can be a refusal to bargain under the Railway Labor Act.

Petitioner believes that the impact of the *no jurisdiction* rule formulated by the Circuit Court will cause far more damage to collective bargaining under the Railway Labor Act than a comparable rule would cause under the National Labor Relations Act. This is so because "[t]he effect of § 6 [of the Railway Labor Act] is to prolong agreements subject to its provisions regardless of what they say as to termination." *Manning v. American Airlines, Inc.*, 329 F.2d 32, 34 (C.A. 2, 1964). Indeed,

this Court's opinion in *Brotherhood of Locomotive Engineers v. Baltimore & Ohio Railroad Co.*, 372 U.S. 284, 9 L. ed.2d 759, 83 S.Ct. 691, and the eventual settlement of the subject dispute at White House bargaining conferences, may have little more than historical significance if a major dispute can be changed into a minor one either by a mere claim that some provision of the contract is applicable or by a superficial observation that the proposed change violates the contract.

The test of a minor dispute can hardly be based on the single question: does the proposed change in rates of pay, rules or working conditions, if effected without consent, violate the contract? All or most of such changes, regardless of their magnitude and regardless of the number of employees affected, violate the contract. But § 2, Seventh, teaches that the distinguishing feature of a major dispute is that the change be applicable to employees *as a class*. In most situations the parties themselves are in agreement when a proposed change raises a major dispute, and in such situations § 6 notices are served as a matter of course. But if the parties are unable to agree, surely a court should not abdicate its judicial function and allow the determination to be made unilaterally by the proponent of the change. If a carrier proposes a far-reaching change—such as abolishing a classification — but does not intend to write the change into the agreement, is the change any less a major one?

A unilateral change in terms and conditions of employment violates the duty to bargain imposed

by the National Labor Relations Act, *NLRB v. Katz*, 369 U.S. 736, 8 L. ed.2d 230, 82 S.Ct. 1107. There is no apparent reason for a less stringent rule under the Railway Labor Act.

Under the NLRA, an employer is required to bargain during the term of an existing agreement as to any mandatory subject not included in the negotiations on the agreement currently in effect, *NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680 (C.A. 2, 1952). And an employer is guilty of a refusal to bargain when it attempts to modify or abolish a certified bargaining unit by transferring employees and equipment to a plant outside the bargaining unit without notification to or bargaining with the certified union. *International Powder Metallurgy Co.*, 134 N.L.R.B. 1601. By the same reasoning, the NLRB and the Second Circuit held that an employer violated the NLRA when it terminated the employment of an entire bargaining unit and contracted out all of the work formerly performed by bargaining unit employees, without bargaining with the union which represented those employees, *Fiberboard Paper Products Corp. v. N.L.R.B.*, 322 F.2d 411 (C.A.D.C., 1963), enforcing 138 NLRB 550, certiorari granted 375 U.S. 963 (Docket No. 610, October 1963 term).

Although both the employer in *Fiberboard* and the carrier herein expressed different legal reasons to justify the unilateral action which in each case was presumably "motivated solely by economic necesssity" (322 F.2d 411, 414), the issue of unilateral transfer of work from the bargaining unit and

whether there is a duty to bargain as to such transfer of work is common to both cases. In light of the pending review of the *Fiberboard* decision, the instant case affords an opportunity to round out the parallel duty to bargain under the Railway Labor Act. This is especially appropriate, for the bargaining requirements of both statutes have been referred to by this court as "like provisions," *Steele v. Louisville* & N.R. Co., 323 U.S. 192, 200, 65 S.Ct. 226; and in *Railroad Telegraphers v. Chicago & N.W.R. Co.*, 362 U.S. 330, 4 L. ed. 2d 774, 80 S.Ct. 761, this Court used the languange of § 13(c) of the Norris-LaGuardia Act [29 U.S.C. § 101 et seq.], defining a labor dispute as including "any controversy concerning terms or conditions of employment," to find that a dispute over abolishing jobs related to "working conditions," which is the phrase used in § 2 of the Railway Labor Act. The Court thus made no distinction between "terms and conditions of employment," also used in § 8(d) of the National Labor Relations Act [29 U.S.C. § 151 et seq.], and "working conditions" used in the Railway Labor Act.

The instant case therefore poses the problem of implementing the Court's interpretation of the duty to bargain defined in *Railroad Telegraphers', supra*. The Court there held that

> ". . . it is impossible to classify as a minor dispute this dispute relating to a major change, affecting jobs, in an existing collective bargaining agreement, rather than to mere infractions or interpretations of the provisions of that agreement." (362 U.S. 341)

In *Railroad Telegraphers'* the carrier had submitted the dispute to the National Railroad Adjustment Board,[6] whereas in the instant case the carrier made no such submission. Yet the Circuit Court herein held that abolishment of yardmaster jobs with accompanying transfer of work to other employees outside the bargaining unit was only a minor dispute, because the carrier did not intend to write the change into the agreement and it had a substantial claim under Rule 16(e) of the agreement.

But whether the carrier intended to write the change into the agreement or not, it was a major dispute because of its effect on the employees as a class, and because the existing agreement did not control the controversy, *Butte Anaconda & Pacific R. Co. v. Locomotive Firemen*, 268 F.2d 54 (C.A. 9, 1959), cert. den. 361 U.S. 864; *Elgin, Joilet & Eastern Ry. Co. v. Burley*, 325 U.S. 711, 89 L.ed. 1886, 65 S.Ct. 1282 (1945).

But did the carrier have a substantial claim under the agreement? Obviously, the Court of Appeals had to construe the agreement in order to state that

> ". . . a defense based upon the language of Rule 16(e) raises a substantial issue as to the interpretation of the contract. It is not a fictitious or merely colorable issue."

The only difference between the constructions by

[6] The carrier's ex parte submission is discussed in the district court's opinion unofficially published at 43 LRRM 2145.

the trial court and by the Circuit Court was that Judge Brewster considered the scope of the certification, the transfer of work to other employees outside the bargaining unit, evidence that the entire classification rather than only individual jobs was being abolished, the intent of the contract as a whole, and the uniform past practice, whereas the Circuit Court considered only the single provision and concluded therefrom that

> "Before a tribunal can decide that the terminations at issue were not justified, it must construe the language of Rule 16(e)."

Both courts thus construed the language, but Judge Brewster concluded, on grounds which were not challenged by the Circuit Court, that the dispute was not a contract dispute at all, but a major dispute. Thus, the issue was not one under which any tribunal (save a possible Presidential Emergency Board with power of recommendation only) would have authority to decide if the terminations were "justified." Justification would only be important as an argument in the collective bargaining process and as an appeal to public opinion.

The Circuit Court confused construing the contract with deciding the dispute under the contract. Petitioner has no quarrel with the proposition that grievances which depend only upon application or interpretation of the contract for their determination must be submitted to the appropriate adjustment board for decision, and such board has exclusive jurisdiction. *Brotherhood of R. Trainmen*

v. Chicago River & I.R. Co., 353 U.S. 30, 1 L. ed. 2d 622, 77 S.Ct. 635; *Locomotive Engineers v. Louisville & N.R. Co.*, U.S. , 10 L. ed. 2d 172, 83 S. Ct. . But the board does not have jurisdiction to find the equivalent of an unfair labor practice under the Railway Labor Act — that function has been vested exclusively in the courts. *Texas & N.O. R. Co. v. Railway Clerks*, 281 U.S. 548, 50 S.Ct. 427; *Virginia Railway Co. v. System Federation*, 300 U.S. 515, 57 S.Ct. 592, 81 L. ed. 789.[7]

This brings us full circle to the beginning of this discussion: *the question of jurisdiction.*

According to the Circuit Court's view, federal court jurisdiction to enforce the statutory duty to bargain exists only when the collective bargaining contract does not require construction. That view makes no distinction among the various purposes for which it may be necessary to construe the contract. In any event, the court must make a preliminary construction to determine whether the dispute is a dispute under the contract or not. If it is found to be such a dispute, it will be labeled "minor" and the court ought to refrain from deciding the case, for such a dispute is admittedly within the exclusive

[7] The following cases are examples of judicial enforcement of the duty to bargain under the Railway Labor Act: *Virginia Railway Co. v. System Federation, supra; Burke v. Morphy*, 109 F.2d, 572 (C.A. 2, 1940); *Roltes v. Dwellingham*, 198 F.2d 591 (C.A. 8, 1952); *Telegraphers v. Railway Express Co.*, 321 U.S. 342, 88 L.ed. 788, 64 S.Ct. 582; *Railroad Yardmasters v. Pennsylvania Railroad Co.*, 224 F.2d 226 (C.A. 3, 1955); *Railway Clerks v. Atlantic Coast Line R. Co.*, 201 F.2d 36 (C.A. 4, 1952), cert. den, 345 U.S. 992, 73 S.Ct. 1131; *Akron, Canton & Youngstown R. Co. v. Barnes*, 215 F.2d 423 (C.A. 7, 1954); *Butte, Anaconda & P.R. Co. v. Locomotive Firemen*, 268 F.2d 54, (CA 9, 1959, cert. den. 361 U.S. 864; *Ruby v. American Airlines, Inc.*, 329 F.2d 11 (C.A. 2, 1964); *Manning v. American Airlines, Inc.*, 329 F.2d 32 (C.A. 2, 1964).

jurisdiction of the adjustment board. But if the preliminary construction reveals a dispute which is not a grievance under the contract but is a major dispute which the adjustment board has no power to settle, then the court should exercise its function under the statute and enforce the duty to bargain and enjoin violation of the status quo pending completion of §6 procedures. This is exactly what Judge Brewster did. He did not construe the contract for the purpose of deciding the case under the contract. He examined the contract—construed it to the extent necessary—to determine that the contract did not apply. He did no more than a court normally does when it enjoins a union from striking over a minor dispute under the *Chicago River* doctrine. He did no more than did the Court in *Butte, Anaconda & P.R. Co. v. Locomotive Firemen*, 268 F.2d 54 (C.A. 9, 1959), cert. den. 361 U.S. 864, which rejected the carrier's argument that its plan for operating a new yard created a minor dispute. The Ninth Circuit there held that "No question was involved as to the interpretation of existing agreements." The contract is not a sacred cow which cannot be examined under any circumstances. If substance is to prevail over form, then the court must be empowered to answer the threshold question: does this dispute arise under the contract, or does it pertain to a change in working conditions of the employees as a class?

In *M.K.T R.R. Co. v. Locomotive Engineers*, 266 F. 2d 355 (C.A. 5, 1959), reversed in part, 363 U.S. 528, 4 L. ed. 2d 1379, 80 S.Ct. 1326, the Fifth Circuit dissolved an injunction maintaining the status quo

in a minor dispute because in its view "the district court could not pass any sort of preliminary judgment upon the merits of that dispute." (266 F. 2d 341). This Court granted certiorari on that point, holding that the examination of the contract was inherent in the granting of an injunction under the *Chicago River* doctrine and the district court was free to exercise the typical powers of a court of equity. Certainly the district court (in fact the very same district court) should have jurisdiction to examine the contract not for the purpose of deciding the dispute under the contract, but only to determine whether the contract governs the dispute, and if it determines that it does not, then it should be free to exercise the typical powers of a court of equity to enjoin imposition of conditions which change the status quo in a major dispute where the carrier has failed to exhaust the bargaining and mediation requirements of the Act.

The decision of the Fifth Circuit herein contradicts the language of this Court in *Railway Conductors v. Pitney*, 326 U.S. 561, 90 L. ed 318, 66 S.Ct. 322. The Circuit Court recognized no jurisdiction under which the district court could construe the contract, regardless of whether the dispute ultimately related to statutory duties or contractual duties. But this Court in *Pitney* did not write in terms of courts having "no responsibility" in contract disputes under the Railway Labor Act, but in terms of "minimum responsibility" (326 U.S. 566). The Court did not deny the district court's jurisdiction to act, but, under the circumstances of that case, where each party based its position on agree-

ments, held that "the court should exercise equitable discretion to give [the NRAB] the first opportunity to pass on the issue. Certainly the extraordinary relief of an injunction should be withheld, at least, until then." (326 U.S. 567). That was a far cry from lack of jurisdiction. At p. 566 the Court added the caveat which presaged the instant case:

> "Of course, where the statute is so obviously violated that 'a sacrifice or obliteration of a right which Congress * * * created' to protect the interest of individuals or the public is clearly shown a court of equity could, in a proper case, intervene."

The instant case is such a proper case, where the trial court has made undisturbed findings of fact that the carrier's plan was to abolish the yardmaster classification without bargaining with the union, finding that

> "If the plan continues, it will terminate the agreement by destroying the subject matter thereof."

But for the intervention of the district court below, four yardmasters in Fort Worth would have lost their yardmaster positions for all time, and a chain reaction, through the bumping procedure [R. 161], would have followed whereby they would have replaced other employees, in other bargaining units, who in turn might also have exercised contractual rights (under different agreements) to replace other employees. Eventually four employees outside the yardmaster classification would lose their jobs. This procedure would then have been repeated throughout the railroad's system. The NRAB would have had no power to stop this abolishment of jobs and transfer of duties to other bargaining units. The railroad would have achieved as a *fait accompli* elimination of a craft or class, and subsequent bargaining would be rendered moot.

Conclusion

If the opinion of the Circuit Court below is allowed to stand as a statement of the jurisdiction of a federal district court in major dispute cases, then the collective bargaining process under the Railway Labor Act will be seriously impaired. This adverse effect of the decision has already been felt, however, for on April 15, 1961, the Fifth Circuit rendered a decision in *Aaxico Airlines, Inc. v. Air Line Pilots Association* (No. 20931) ——— F.2d ——— [55 LRRM 2982, 49 CCH LC ¶18,886], on the authority of its opinion in the instant case, holding a district court had no authority to find that a collective bargaining contract was still in effect, when the carrier was admittedly denying coverage of the

contract and was proceeding to change wages and working conditions without treating with the certified representative of its employees. Motion for rehearing is pending therein. But should the present opinion in *Aaxico* stand, petitioner herein will respectfully request this Honorable Court to withhold decision in the instant case pending receipt of petition for certiorari in the *Aaxico* case because of errors of law which are common to both cases.

For the foregoing reasons, petitioner prays that writ of certiorari be granted herein, and upon review the decision of the Court of Appeal for the Fifth Circuit be reversed.

Respectfully submitted,

CHARLES J. MORRIS,
1601 National Bankers Life Bldg.,
Dallas 1, Texas

Of Counsel:

MULLINAX, WELLS, MORRIS & MAUZY
1601 National Bankers Life Building
Dallas 1, Texas

May 14, 1964